

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





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74-2180

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

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MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,

Plaintiff,

v.

Docket No.  
74-2180

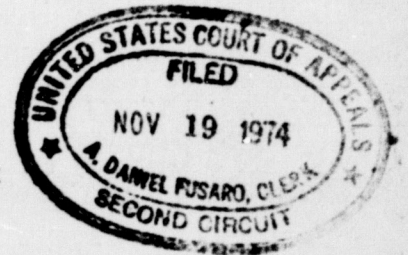
LAWRENCE E. SIMON, THIRD NATIONAL BANK  
OF HAMPDEN COUNTY, STERLING NATIONAL BANK  
& TRUST COMPANY OF NEW YORK, NATIONAL BANK OF  
NORTH AMERICA, DASHA AUERBACH STUART,  
Executrix under Last Will and Testament of  
Josef Auerbach, IRVING GEIST, KENNETH DEMBSKI,  
ROYAL S. MARKS, SAMUEL HADDAD, NATALIE HADDAD,  
HENRY HECHT, SR., ALICE HECHT, MARY ELLEN  
HECHT AND HENRY HECHT, JR.,

Defendants,

and

ROBERT B. SCHINDLER, As Trustee in Bankruptcy  
of Lawrence E. Simon, Bankrupt,

Intervenor-  
Appellant.



APPENDIX OF INTERVENOR-APPELLANT

SHELDON LOWE  
Attorney for Intervenor-Appellant  
41 East 42nd Street  
New York, New York 10017  
212 YU6-1122

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PAGINATION AS IN ORIGINAL COPY



1 Q 1932?

2 A Oh, no. 1915. In 1932 I was appointed General  
3 Agent.  
4

5 Q In your individual capacity?

6 A Well, a general agent is the representative of  
7 the home office of the company.

8 Q Yes, but were you a general agent in your  
9 individual capacity rather than in a corporate form?

10 A Oh, yes. There was no corporation.

11 Q You have personally the general agency contract?

12 A That's correct, sir.

13 Q How long did you continue as a general agent for  
14 the Massachusetts?

15 A From July 1, 1932 to May 30, 1959.

16 Q During all of that time did you have your place  
17 of business in the City of New York?

18 A Yes, sir.

19 Q In the county of New York?

20 A Yes, sir.

21 Q Where were your records maintained with respect  
22 to the conduct of your business?

23 A My personal records?

24 MR. PLATT: Your Honor, I object to that. I don't  
25 see that it's relevant here.

THE COURT: Pardon?

MR. PLATT: I don't see that that's relevant here where his records were maintained.

THE COURT: I will allow it.

MR. LOWE: It's quite relevant, your Honor, on the conflict.

THE COURT: I said I will allow it.

MR. LOWE: May I have that question and answer read, please?

(Question read.)

A In two places. In my office at 320 Park Avenue, and also at the home office of the Massachusetts Mutual, Springfield, Massachusetts.

Q What records were maintained here in New York?

A Well, my permanent records consisted of the amounts of commissions due me from the company and paid month by month, and the amounts of insurance sold, and the usual details concerning the policies that were sold by my salesman.

Q Those were your records, were they not?

A Yes, my records is right.

Q And where were they kept?

A In my safe and in some filing cabinets in my office.



2 to take an oath, I believe his name was Platt. I am not sure.  
3 If it wasn't Mr. Platt, I believe it was somebody from his  
4 office.

5 Q What firm is that?

6 A Was it Platt, Bleakley and something else, the  
7 law firm? And he asked if I had received an envelope with  
8 a form in it. I said, "Yes, I just came in." "Will you  
9 please be sure when you sign it to return it to us?"

10 I said, "Very well," and then he said to me  
11 something like this, I don't remember the exact words but  
12 as near my best recollection, he said, "Now, don't you go  
13 through any bankruptcy proceeding for the next four months."  
14 And so I was a little bit surprised at that. I didn't know  
15 what he had in mind so I said, "Very well," and I hang up.

16 Then I opened my mail and this was in it.

17 Q This document was in it?

18 A Was in one of the envelopes.

19 Q Was there a firm title on the envelopes that  
20 were received or the envelope that was received?

21 A Yes, I believe there was, Mr. Lowe, but I don't  
22 want to tell you, not under oath, exactly I am sure the name on  
23 the envelope.

24 Q Give us your best recollection.

25 A My best recollection was the name of Platt,

2 Bleakley and somebody else, the lawyers.

3 MR. LOWE: May I offer this in evidence, your  
4 Honor?

5 MR. PLATT: I have no objection.

6 (Defendant Trustee's Exhibit D marked and  
7 received in evidence.)

8 Q In March of 1970--

9 A Just one second. May I just see it one second?

10 Q Surely.

11 (Hands document to witness.)

12 A That's right.

13 (Hands document to Mr. Lowe.)

14 Q Is there anything you want to add to what you  
15 said?

16 A No, not yet.

17 Q In March of 1970, were you represented by an  
18 attorney?

19 A Yes, sir.

20 Q Who was your attorney?

21 A The firm of Arutt, Nachman, Benjamin & Rubin.

22  
23 Q Isn't it a fact that that firm filed the Chapter 11  
24 for Pension Corporation of America?

25 A Yes, sir, it did.



1 MR. KONE: I offer this in evidence.

2 MR. PLATT: No objection.

3 (Defendant Trustee's Exhibit L received in  
4 evidence.)

5 Q Would you look at the second paragraph of  
6 that letter, sir?

7 A Yes.

8 Q Wherein reference is made to a note of Mr. Simon  
9 dated June 17, 1963, for the principal sum of \$30,000.

10 A Yes.

11 Q Do you know whether or not any loan was made to  
12 Mr. Simon after 1963?

13 A Not of my own knowledge.

14 Q It would certainly appear from that letter  
15 that there was such a loan, wouldn't there?

16 MR. PLATT: I object to the form.

17 THE COURT: Sustained.

18 Q How long was it after March 1967 that the  
19 insurance company continued to make payments to Third  
20 National Bank on its assignment?

21 Perhaps we can save some time, sir.

22 A Through December of 1967. Through December of  
23 1967.

24 Q Of 1967, is that correct?

2 A Well, excuse me.

3 Q I just want to get the date straight.

4 A Would you repeat your question, again please?

5 A I think-- it wasn't 1968, you are sure it was  
6 1967?

7 A December 1967, was the last payment.

8 Q What was the aggregate of the payments made?  
9 Approximately, I don't care about the exact figure.

10 A \$49,878.62.

11 Q Do you know, sir, on what day of the month  
12 payments were to be remitted of the renewal commission to the  
13 bank?

14 A No, I do not know the exact day of the month.

15 Q Did they become due to Mr. Simon as of a  
16 particular day of the month?

17 A They became due to Mr. Simon when the premium  
18 for which a commission was paid was paid to the company.

19 Q Is it my understanding then, that every time the  
20 company got a renewal premium from a policy-holder, it  
21 remitted the commission to Mr. Simon?

22 A It could have been.

23 Q Well, did it?

24 A I believe it paid them either once or twice a  
25 month, either the first and the last of the month.



1 MBpa  
2 Q But they were never accumulated to any extent  
3 were they?

4 A Never beyond a month's time, no.

5 Q What would be the average accumulation of  
6 Mr. Simon's commissions on the renewal premiums that were  
7 paid to the company by policy-holders?

8 MR. POST: As of what date, please?

9 MR. LOWE: Beginning with March of 1967.

10 A I could not tell you.

11 Q Can you give me a guess?

12 A No, sir.

13 Q Do you have any specialty as an attorney, sir?

14 A I am involved in insurance litigation, life  
15 insurance policies; general litigation.

16 Q These payments that were due to Mr. Simon under the  
17 general agent's agreement which was executed in 1936 and which  
18 I believe is in evidence, provided for the payment to him  
19 for commissions on renewal premiums on policies?

20 A That's correct.

21 Q At the time of the execution of that agreement,  
22 were those payments contingent or certain?

23 MR. PLATT: I object to the form of that question,  
24 your Honor. I object to the form and the substance of the  
25 question. The agreement speaks for itself.

1  
2 THE COURT: Sustained.

3 Q Is there any provision of the general agent's  
4 agreement executed in 1932 which covers the subject matter  
5 of my last question?

6 A There is provision in the general agent's contract  
7 on commission and we came--

8 Q Would you be kind enough to point that out to  
9 me, sir? Do you have the copy that is marked in evidence?

10 THE COURT: Mr. Lowe, I don't see the point of  
11 this anyhow. Whether there is a provision in there or not  
12 you can point out to me in argument. I am not going to take  
13 this witness's opinion on the effect of that contract  
14 whatever is in it, so I sustain my own objection to this  
15 question and I ask you to proceed.

16 Q What happened with respect to the transmission  
17 of Mr. Simon's commissions-- renewed commissions beginning  
18 with January, is it?

19 A They were escrowed by the company at my  
20 direction.

21 Q Beginning in January of 1968?

22 A Yes.

23 Q Prior thereto was there any fund with the  
24 company to which Mr. Simon was entitled?

25 A I'm not quite sure I--



Q As of the end of December 1967.

A Yes.

Q Was the insurance company holding in any form any commissions that were due to Mr. Simon in any fashion?

A No, sir.

Q Everything had been remitted to the bank, isn't that right?

A Yes, that's right.

Q I ask you again how much was the insurance company holding in the month of January 1968.

MR. POST: Is that during or at the end of?

MR. LOWE: At the end of the month. I don't care.

MR. POST: It is quite important.

MR. LOWE: You tell me how I ought to ask it.

MR. POST: Because it depends on when those premiums are remitted. Until they are remitted there is no commission renewal due.

THE COURT: All right, you want it as of January 31, 1968?

MR. LOWE: Or whatever date that Mr. Post suggests is the appropriate date, your Honor.

MR. POST: I would suggest as of the end of these different months, your Honor, as the easiest way to look at this.

1 THE COURT: All right, thank you, Mr. Post. We  
2 will follow that.

3 Give it to him as of the end of January 1968.

4 MR. PLATT: I question whether all this is  
5 relevant, your Honor.

6 THE COURT: Why is it relevant, Mr. Lowe?

7 MR. LOWE: If your Honor pleases, levy was made  
8 by Auerbach, and I believe it was on January 10, 1968.

9 I am trying to ascertain the extent of the levy  
10 that was made by the <sup>judgment</sup> creditor. I want to  
11 know how much it was that he levied on in order to determine  
12 the extent of that levy.

13 THE COURT: The position being that the levy is  
14 what perfects the lien and the measurement of--

15 MR. LOWE: That's correct and I respectfully  
16 direct your Honor's attention--

17 THE COURT: I understand. I will allow you to  
18 elicit it and we will argue the law later. It sounds like  
19 a certainly plausible position and based on what I have  
20 heard, I am not sure whether it's correct or not. Mr. Robins  
21 may have views about it but I will let you elicit the  
22 evidence.

23 A At the end of January 1968 we had in escrow,  
24 Massachusetts Mutual had in escrow, commissions payable  
25



under Mr. Simon's general agent's contract and payable under personal contracts between Mr. Simon and general agents subsequent to him, a total of \$7,000.00.

Q Am I correct then in stating that at the time the levy was made on the bank, on the insurance company, there was approximately \$7,000?

THE COURT: Oh no, of course you are correct. That's what he just told you. Now, Mr. Lowe, I am pressuring you and cajoling you and using whatever other devices are at my disposal to help me move with dispatch. One way you won't help me is by repeating the answer to the question and ask if that's correct.

Next question.

Q Now, are you aware of the fact that the interpleader action was started on May 12, 1970?

A Yes.

Q How much money was being held in each of the accounts you described?

MR. ROBINS: That's been stipulated to, your Honor.

THE COURT: You are a party to that stipulation, Mr. Lowe, yes?

MR. LOWE: That is the fact, your Honor, right.

THE COURT: All right, next question.

competency, relevance and materiality, your Honor, as to that memorandum.

MR. PIATT: May I see it, please?

(Defendant Trustee's Exhibit M marked for identification.)

MR. ROBINS: Your Honor, I have no object to the document, speaking for myself, except that it bears some underlining in pencil which I assume was made by Mr. Lowe.

MR. LOWE: I wouldn't any reference to the underlining, your Honor.

THE COURT: Allright.

MR. ROBINS: I have no objection to that paper, your Honor.

MR. PIATT: I have no objection to its admissibility.

THE COURT: Objection overruled. It will be received. You can argue relevance and materiality. I don't know what competency means in this context.

(Defendant Trustee's Exhibit M marked and received in evidence.)

THE COURT: Will you tell me what you mean by competency?

MR. POST: Rather than wasting time, as long as the litigants have no objection, I will withdraw any objection



obtained from me during some informal discovery proceeding.

THE COURT: Then why don't you just hand them on to counsel who may wish to object?

MR. POST: Very well.

MR. PLATT: I have no objection.

MR. ROBINS: I have no objection.

(Defendant Trustee's Exhibit H received in evidence.)

Q Sir, I show you a copy of a letter dated June 2, 1969 apparently prepared by you.

MR. LOWE: First perhaps I would like to have it marked for identification.

(Trustee's Exhibit O marked for identification.)

Q Sir, would you look at Trustee's Exhibit O for identification?

A Yes, sir.

Q Was that prepared by you, sir?

A Yes, sir.

Q In the first paragraph you stated that neither the Third National Bank--

MR. PLATT: I object. Now wait a minute. I object to his reading from an exhibit not in evidence.

THE COURT: Offer it in evidence.

MR. LOWE: Quite right, Mr. Platt.

(Defendant Trustee's Exhibit Q received in evidence.)

Q I take it then that on January 25, 1968 you mailed the copy of the Auerbach execution to Mr. Brooks who represented Third National?

A Yes, I did.

MR. LOWE: May I have that marked for identification, please?

(Trustee's Exhibit R marked for identification.)

Q I show you Trustee's Exhibit R for identification, a letter dated January 10, 1968, addressed to Mr. Simon. Was that letter prepared by you and sent to him?

You will note that there is underlining in the body of the letter. Would you ignore that, please?

A Yes, sir.

MR. LOWE: Mr. Kenner, do you have the original of this letter of January 10, 1968 directed to Mr. Simon?

MR. KENNER: Which letter are you referring to? I haven't even seen it.

I don't think so but I will look in my record of correspondence if the Court will permit and I will tell you.

MR. LOWE: May we have a moment?



A Yes, sir.

MR. LOWE: I think I will offer this in evidence if I may.

MR. PLATT: Again, I have no objection but I again would like to call to Mr. Lowe's attention--

THE COURT: No, don't do that any more. Don't do that any more, please. Just tell me if you have objection.

MR. PLATT: No objection, your Honor.

THE COURT: It will be received.

(Defendant Trustee's Exhibit S received in evidence.)

Q The last sentence of this exhibit recites, "I believe that unless Mr. Simon can have the restraining notice lifted before January 29, 1968, the next date on which payment would ordinarily be made to your bank under the assignment, it will be necessary for us to escrow the funds."

Was there any anticipation that that restraining notice would be lifted?

A I had been in touch with Mr. Simon by telephone about this restraining notice.

Q Will you tell me what the substance of the conversation was, sir?

evidence.

(Defendant Trustee's Exhibit X received in evidence.)

Q Now, in the first paragraph of Trustee's Exhibit X in evidence, you state that you met with Mr. Moakler, cashier of the Third National Bank, and Clarence Brooks, Counsel for the bank, on Monday, February 19, 1968.

A Yes, sir.

Q Where did that meeting take place?

A In my office.

Q At whose instance?

A I don't recall whether I requested it or whether Mr. Brooks requested it or whether Mr. Moakler requested it but one of us did.

Q What was the purpose of meeting on that date?

A To discuss Mr. Simon's debt to the bank, the assignment, the attachment-- the restraining notices, the possibility of filing an interpleader in Boston.

Q And you felt that was necessary that you or the Massachusetts Mutual Life Insurance Company discuss that with the bank?

A Well, they were the closest creditor.

Q Did you have to get the bank's permission to



2 a letter dated February 19, 1968, on the letterhead of  
3 Brooks and Brooks, addressed to you.

4 MR. LOWE: Can we stipulate, Mr. Post, that that  
5 is a copy of a letter furnished to me by you?

6 MR. POST: I think that is part of that same  
7 group. It was so furnished.

8 A Yes, sir.

9 Q At the meeting that took place on the 19th of  
10 February, was an understanding arrived at between the  
11 company, the insurance company, and the bank, that a  
12 letter or the letter, the February 19, 1968, Trustee's  
13 Exhibit Y for identification, would be prepared and sent  
14 to you?

15 MR. PLATT: Your Honor, I am going to object to  
16 any reference to any letter that is not in evidence.

17 MR. LOWE: You are quite right, I am sorry.  
18 Mr. Platt. I will offer it in evidence.

19 MR. PLATT: No objection to Exhibit Y.

20 (Trustee's Exhibit Y received in evidence.)

21 MR. LOWE: Would you read back the last question,  
22 please?

23 (Question read.)

24 A Yes.

25 Q I show you a letter dated February 21, 1968,

2 withdrawn.

3 Q Mr. Buntin, were these commissions payable  
4 on a monthly basis?

5 A They were payable on a monthly basis,  
6 yes.

7 Q Usually at the end of the month, is that  
8 correct?

9 A Yes.

10 MR. ROBINS: Your Honor, I object to this.  
11 This was all gone into before Judge Frankel.

12 THE MAGISTRATE: I know but there has  
13 been quite a period of time that has passed. The  
14 witness has to be brought up to what I assume is new  
15 testimony -- I hope there will be new testimony.

16 MR. ROBINS: I share your Honor's hope.

17 MR. LOWE: May I have the question read,  
18 please.

19 (Question read by the reporter.)

20 Q What was the amount of commissions payable  
21 to Mr. Simon at the end of each month?

22 A The amount of -- if you were an active.  
23 general agent it would be in the amount of new busi-  
24 ness written during that month and paid for, and the  
25 amount of old business that was renewal premiums were



2 paid, and other allowances that were provided for in  
3 his general agent's contract.

4 Q Is it fair to state that the commissions  
5 that were paid to him were dependent upon the amount  
6 of renewal premiums paid during each preceding  
7 month?

8 MR. PLATT: I object to that. . He just  
9 answered the question.

10 THE MAGISTRATE: What happened is that  
11 the question previously concerned only renewal com-  
12 missions, and the witness' answer concerned all com-  
13 missions and payments made, and it was not truly  
14 responsive in that respect.

15 I am hoping to cut through this a little  
16 more rapidly.

17 Dealing with renewal commissions only as  
18 opposed to new commissions and other forms of pay-  
19 ment.

20 THE WITNESS: With renewal commissions,  
21 Mr. Simon would have received his commissions on  
22 renewal business. I say "renewal" -- renewal  
23 premiums received during that month.

24 Q It would be only if the renewal premium  
25 was paid would Mr. Simon get a commission. Is that

2 a fair statement?

-cross

3 A That is right. No payment, no com-  
4 mission.

5 MR. LOWE: I have no further questions.

6 THE COURT: Cross-examination. I think  
7 we will take cross-examination in the order that the  
8 parties are listed. I am certainly not going to  
9 urge anyone to cross-examine who does not feel it is  
10 necessary, but the first cross-examiner will be Mr.  
11 Simon's attorney, if he wishes to cross-examine.

12 CROSS EXAMINATION

13 BY MR. KENNER:

14 Q My question, Mr. Bunten, is not really  
15 cross-examination, but it is merely a matter of  
16 definition.

17 When you talk about commissions, and you  
18 used the phrase "renewal commissions", you intended,  
19 I presume, to relate to business which had been  
20 either written or continued in force by which Mr.  
21 Simon earned this commission; is that correct?

22 A That is correct.

23 Q That does not include, then, the floor  
24 plan payments to which reference was made in your  
25 deposition of May 18; is that correct?



2 A Yes, I believe it is Exhibit L.

3 THE MAGISTRATE: He thinks it is Exhibit L.

4 THE WITNESS: Trustee's Exhibit L.

5 MR. LOWE: L instead of 18.

6 THE WITNESS: Yes.

7 MR. LOWE: I have the original of that  
8 letter (handing).

9 Q Do you recall that letter, Mr. Bunten,  
10 Exhibit L?

11 A Yes, sir.

12 Q And from and after that date did the  
13 Massachusetts Mutual remit all renewal commissions  
14 under the General Agent's Contract to which we just  
15 referred, to the Third National Bank of Hampden  
16 County?

17 A Commencing with the commissions for the  
18 month of March 1967, that is when we started.

19 Q And for how long a period did you remit  
20 the commissions from the Massachusetts Mutual's offices  
21 to the Third National Bank's office?

22 A Through the month of December 1967.

23 Q From March 1967 through the month of December  
24 1967, is that correct?

25 A Yes.

2 Q Where the payment was deferred depending  
3 on the renewal commissions being paid.

4 MR. LOWE: I will withdraw my objection.

5 A I am not sure that I can answer that yes  
6 or no, Mr. Platt, because --

7 Q What is wrong with it?

8 A Well, according to my understanding, Mr.  
9 Platter, a renewal commission is not earned or does  
10 not accrue until a renewal premium is paid.

11 Q All the work has been done by the agent  
12 with respect to that earning of commission, is it not,  
13 at the time that the business is written?

14 MR. LOWE: I object to that, your Honor.

15 THE MAGISTRATE: Sustained.

16 To clarify the record I will put this  
17 question to you, Mr. Buntin:

18 Whether or not agents are expected to  
19 service their customers following the initial writing  
20 of the contract, if any customer service is necessary.

21 THE WITNESS: Yes.

22 Q Was Mr. Simon, after his General Agent's  
23 Contract had terminated on December 31, 1962, in that  
24 category?

25 MR. LOWE: I object to that, your Honor.



1 mks

2 the witness to correct any earlier answer that he  
3 feels is incorrect.

4 MR. LOWE: Nothing so dramatic is going  
5 to happen. I am attempting to fill in a gap in  
6 the testimony.

7 MR. PLATT: I object to that.

8 THE MAGISTRATE: I am going to allow it.

9 BY MR. LOWE:

10 Q You said, "Until July 31, 1968 when I  
11 moved out of those premises" -- referring to 320 Park  
12 Avenue.

13 THE WITNESS: Your Honor, the error is  
14 July 3rd -- not July 31st.

15 Q All right. Between July 3, 1968 when  
16 you moved out of those premises?

17 A Yes, sir.

18 Q I see the date you filed your bankruptcy  
19 petition was some time in June or July of 1970?

20 A That is correct.

21 Q Were those records still in New York State?

22 A Yes, sir.

23 MR. LOWE: I have no further questions.

24 THE MAGISTRATE: You mean all this fuss  
25 was over changing from July 31st to July 3rd?

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2 to Mr. -- gave a copy of it to the trustee this morning.

3 . If I had it early yesterday evening I  
4 would have sent it up, but this is the first time I  
5 uncovered it.

6 MR. LOWE: Do you have any objection to  
7 the introduction of this in evidence?

8 MR. PLATT: No.

9 MR. LOWE: Then I will offer this as the  
10 next exhibit of the trustee.

11 THE MAGISTRATE: It is offered only with  
12 respect to the Third National Bank, I take it?

13 MR. LOWE: Yes.

14 THE MAGISTRATE: All right, there being no  
15 objection, that may be marked in evidence as the next  
16 exhibit.

xx

17 (Memorandum of Mr. Moskley marked  
18 Trustee's Exhibit AG in evidence.)

19 THE MAGISTRATE: Call your next witness,  
20 Mr. Lowe.

21 MR. LOWE: Off the record.

22 (Discussion off the record.)

23 THE MAGISTRATE: For the record, the Third  
24 National Bank and the trustee stipulate the following  
25 facts --

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